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In Reply Refer to: 1800B-IB

John Garziglia, Esq.  
Womble Carlyle Sandridge & Rice, LLP  
1200 19<sup>th</sup> Street, N.W., Suite 500  
Washington, DC 20036

Michael D. Basile, Esq.  
Cooley LLP  
1299 Pennsylvania Ave., N.W.  
Suite 700  
Washington, DC 20004

Mark B. Denbo, Esq.  
Smithwick & Belendiuk, P.C.  
5028 Wisconsin Ave., N.W.  
Suite 301  
Washington, DC 20016

Re: W255CJ, Atlanta, Georgia  
Facility ID No. 148550  
File Nos. BPFT-20110711AEI  
BLFT-20110915ACL  
BRFT-20111201PCV  
BLFT-20190208ADP

Dear Counsel:

The Media Bureau (Bureau) considers herein longstanding petitions concerning FM translator station W255CJ, Atlanta, Georgia (Translator), which is licensed to Cumulus Licensing, LLC (Cumulus). The first petition, from Cox Radio, Inc. (Cox) licensee of same-market station WSB-FM, Atlanta, Georgia,<sup>1</sup> seeks reconsideration of the Bureau's grant in 2011 of applications to modify the Translator<sup>2</sup> and to license the modified facility.<sup>3</sup> A second petition, filed in 2012 by WKNG, LLC (WKNG), licensee

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<sup>1</sup> Cox Petition for Reconsideration and Informal Objection (Sept. 26, 2011) (Cox Petition). Cumulus filed an Opposition on October 12, 2011, to which Cox filed a Reply on October 24, 2011.

<sup>2</sup> File No. BPFT-20110711AEI (Modification Application) (granted Sept. 9, 2011).

<sup>3</sup> File No. BLFT-20110915ACL (2011 License) (granted Sept. 29, 2011).

of co-channel station WWGA(FM), Tallapoosa, Georgia,<sup>4</sup> asks the Bureau to deny the Translator's license renewal application.<sup>5</sup> For the reasons discussed below, we find no grounds to disturb the Bureau's prior application grants, will renew the Translator's license, and will also grant a pending application to license the Translator's recently modified facilities.

**Background.** The Translator was first licensed in 2007 to Edgewater Broadcasting, Inc. (Edgewater) for the community of Tallapoosa, Georgia. Edgewater filed a series of successive, uncontested minor change applications, each making a short "hop" to a new transmitter site, thus moving progressively away from Tallapoosa and toward Atlanta.<sup>6</sup> In all, the Translator moved approximately 52 miles over about four years. Edgewater filed nine "hop" applications on its own, and two more in connection with a 2010 agreement with Cumulus to purchase the station.<sup>7</sup> Cumulus constructed the final "hop" and, in conjunction with a June 2011 application for a covering license, changed the Translator's community to Atlanta.

On July 11, 2011, Cumulus filed the Modification Application seeking to increase the Translator's coverage without changing site or community, *i.e.*, a minor change application not involving any additional "hop." The Modification Application was uncontested but in technical conflict with seven previously-filed applications for new FM translators (the Seven Applications), including four filed by Edgewater. Cumulus identified the conflict but stated that the Seven Applications "will be dismissed."<sup>8</sup> The Bureau placed the Modification Application in queue behind the Seven Applications.

On July 12, 2011, one day after Cumulus filed the Modification Application, the Commission released an *LPFM Order* which aimed to ensure that the large number of pending applications for new FM translators from a prior filing window would not preclude opportunities to establish new Low Power FM (LPFM) stations.<sup>9</sup> The *LPFM Order* limited the number of pending new FM translator applications which any applicant could continue to prosecute and directed the Bureau to suspend processing of minor change applications by existing FM translators proposing to move into spectrum-limited markets, including Atlanta.<sup>10</sup>

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<sup>4</sup> WKNG, Petition to Deny (filed Feb. 24, 2012) (WKNG Petition). The parties have filed numerous pleadings since that time, and it is unnecessary to recount each filing. We note that WKNG and Cumulus vehemently disagreed about whether the Translator caused interference to WWGA; that on March 28, 2014 WKNG voluntarily withdrew all previous interference allegations but made new complaints; that WKNG submitted additional complaints on January 8, 2016; and claimed on February 8, 2017 that some of the complaints still had not been resolved.

<sup>5</sup> File No. BRFT-20111201PCV (Renewal Application).

<sup>6</sup> A direct move from Tallapoosa to Atlanta would have then been impossible because it would have been considered a "major" change, requiring a translator application filing window, of which there had been none since 2003. *See generally*, 47 CFR § 74.1233(a)(1) (definition of "major" change).

<sup>7</sup> *See* File No. BALFT-20100723AJD, para. 7. The Bureau granted the assignment on September 2, 2010, and the parties consummated on March 2, 2011.

<sup>8</sup> Modification Application, Exhibit 12, Section E-1.

<sup>9</sup> *See Creation of a Low Power Radio Service*, Third Further Notice of Proposed Rulemaking, 26 FCC Rcd 9986 (2011) (*LPFM Order*) (subsequent history omitted).

<sup>10</sup> *Id.* at 9996-97, paras. 25-27.

By late August 2011, the Bureau had received requests to dismiss several thousand pending FM translator applications, including each of the Seven Applications. The requests to dismiss the Seven Applications contained no indication that the dismissals were the result of any agreement, as would have been required had Cumulus arranged for the dismissals.<sup>11</sup> By September 6, 2011, the Bureau had dismissed each of the Seven Applications, which had the effect of moving Cumulus's Modification Application to the front of the queue. The Bureau granted the Modification Application on September 9, 2011. Cumulus built the modified facilities and filed the covering License Application on September 15, 2011.

Cox, on September 26, 2011, filed its petition for reconsideration of the Modification Application's grant.<sup>12</sup> The Bureau, however, licensed the modified facilities on September 29, 2011 before learning of the Cox Petition. Cumulus filed the Renewal Application on December 1, 2011, the due date for license renewal applications for all Georgia radio stations. On February 24, 2012, WKNG petitioned to deny the Renewal Application.

Cox argues that the Bureau should rescind grant of the Modification Application because: (1) Cumulus allegedly obtained the grant improperly by failing to disclose agreements for dismissal of the Seven Applications; (2) Cumulus's multiple "hops" should, under a policy established in *Mattoon*,<sup>13</sup> have been treated as a single major modification into the spectrum-limited Atlanta market and, thus, subject to the processing freeze announced in the *LPFM Order*; and (3) the Translator would allegedly provide better service with its pre-modification facilities due to incoming interference from Cox's implementation of digital facilities. Cox further argues that rescission of the Modification Application grant should lead to dismissal of the 2011 License.<sup>14</sup>

WKNG similarly, but in the context of the Renewal Application, contends that the Translator's "hops" and circumstances surrounding dismissal of the Seven Applications are abusive. It further argues that the Bureau should deny the Renewal Application due to alleged interference that the Translator is causing to WWGA.<sup>15</sup>

In the years following the subject applications and petitions, WKNG has pursued and Cumulus has disputed claims of alleged interference between the Translator and WWGA. The matter culminated with an April 11, 2018 letter in which the Bureau granted WKNG's interference complaint in part and

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<sup>11</sup> 47 CFR § 73.3525(a).

<sup>12</sup> See Cox Petition.

<sup>13</sup> *Id.* at 6-7, citing *John F. Garziglia, Esq., W263AQ, Mattoon, IL*, Letter, 26 FCC Rcd 12685 (MB 2011) (*Mattoon*).

<sup>14</sup> Cox does not allege that Cumulus failed to satisfy any permit requirement. Cox simply argues that if, as it advocates, we rescind grant of the underlying Modification Application, it would logically follow that we also should dismiss the 2011 License for the same facilities. See Cox Petition at 2, 9.

<sup>15</sup> Translators are secondary stations that must protect the regularly used signals of full-service stations. See 47 CFR § 74.1203(a)(3).

required the Translator to suspend operations.<sup>16</sup> In October 2018, Cumulus obtained special temporary authority (STA) allowing the Translator to return to the air with directional facilities that reduce Effective Radiated Power (ERP) toward WWGA.<sup>17</sup> Cumulus recently obtained a permit to modify the Translator with a yet further reduced directional signal and has a pending, uncontested application to license the modified facilities.<sup>18</sup> Cumulus stated on February 7, 2019, that it has not received any interference complaints from WKNG listeners since the Translator's 2018 return to the air.<sup>19</sup>

**Procedural Matters.** Petitions for reconsideration may be filed within 30 days of public notice by a party to a proceeding or by a person whose interests are adversely affected.<sup>20</sup> A non-party must demonstrate the manner in which its interests are adversely affected and show good cause for why it was not possible to participate earlier.<sup>21</sup> Petitions to deny broadcast license renewal applications are due by the first of the month prior to license expiration.<sup>22</sup>

The Communications Act of 1934, as amended (Act), requires grant of applications for covering licenses if all terms and conditions of the underlying construction permit have been met.<sup>23</sup> The Act provides for renewal of broadcast licenses provided that, during the preceding license period, the station has served the public interest with no serious violations and no smaller violations which, taken together, constitute a pattern of abuse.<sup>24</sup>

Cox seeks reconsideration of the Modification Application but was not a party thereto. It now claims an interest as a same-market competitor but does not show sufficient reason that it could not have participated prior to the application's grant.<sup>25</sup> Accordingly, we dismiss the Cox Petition with respect to

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<sup>16</sup> See Letter from James D. Bradshaw, Senior Deputy Chief, Audio Division to Mark B. Denbo, Esq. (MB Apr. 11, 2018) (Cessation Letter).

<sup>17</sup> See File No. BSTA-20180810ABA (granted Oct. 22, 2018) (2018 STA).

<sup>18</sup> See File No. BLFT-20190208ADP (2019 Application).

<sup>19</sup> File No. BESTA-20190207AAF, Exh. 32 (filed Feb. 2, 2019 and dismissed as moot Feb. 14, 2019 because filing of 2019 License provided same result) (STA Extension).

<sup>20</sup> 47 CFR § 1.106(b)(1), (f).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* § 73.3516(e) (applicable to FM translators pursuant to § 74.780).

<sup>23</sup> 47 U.S.C. § 319(c).

<sup>24</sup> *Id.* § 309(k).

<sup>25</sup> Cox claims that the impact of the application on Cox did not become apparent until the last of the Seven Applications was dismissed and that the three-day period between that dismissal and grant of the Modification Application provided inadequate time to object. See Cox Petition at 2, n.3. We do not find this reasoning sufficient to establish good cause for failure to participate earlier in the proceeding, prior to the grant. See 47 CFR § 1.106(b)(1). The Bureau provided public notice of the Modification Application and waited at least 30 days before acting, and there was no change in the proposed facilities in that time period. See *Broadcast Applications*, Public Notice (July 14, 2011). Thus, it appears that Cox either did not review the Modification Application carefully, if at all, or erroneously assumed that the application would remain non-grantable for a long time even though Cumulus

the Modification Application. Cox also intended its filing as an informal objection to the 2011 License, which we granted within two weeks of application, unaware of Cox's filing. Because the 2011 License was pending for fewer than 30 days, we find that Cox has satisfied the Section 1.106(b) requirement to show why it could not have participated earlier and will treat Cox's filing as a petition for reconsideration of the 2011 License's grant.<sup>26</sup>

The WKNG Petition is timely with respect to the Renewal Application, and we will address it in that context, *i.e.*, to consider whether the Translator has violated the Commission's rules (Rules) during the license period. To the extent, however, that WKNG also argues that alleged violations should cause us to rescind grants of the Modification Application and prior uncontested "hops," we will not consider such matters because they are late-filed.<sup>27</sup> WKNG provides no reason it could not have timely participated in those proceedings.

**The Seven Applications.** Cox and WKNG argue that Cumulus entered into agreements for dismissal of the Seven Applications without informing the Commission, in violation of Section 311(c) of the Act and Section 73.3525(a) of the Rules.<sup>28</sup> Their allegations of undisclosed agreements are, however, purely speculative and, thus, fail to present any substantial and material question of fact.<sup>29</sup> Cox and WKNG base their allegations solely upon their own beliefs that Cumulus could not otherwise have predicted the dismissals.<sup>30</sup> In our experience, however, it would not be unusual for parties to anticipate Commission actions like the *LPFM Order's* proposed mass dismissals of translator applications, taken in a rulemaking proceeding or at the direction of Congress.<sup>31</sup> Indeed, about a week prior to WKNG's prediction, the Commission had given public notice that it would, in connection with prior Congressional

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specifically stated that the application would be grantable once the Seven Applications were dismissed. Neither carelessness nor an erroneous assumption can justify the failure to object to the Modification Application prior to its grant. *See Immanuel Broad. Network, Inc.*, Letter Order, 32 FCC Rcd 7538, 7541-42 (MB 2017); *Canyon Area Residents*, Memorandum Opinion and Order, 14 FCC Rcd 8153, 8154, para. 7 (1999).

<sup>26</sup> *See Association for Cmty. Ed., Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 12682, 12684 (2004), citing *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17854 (1997).

<sup>27</sup> *See* WKNG Petition at 4-8.

<sup>28</sup> *See* 47 U.S.C. § 311(c)(1); 47 CFR § 73.3525(a) (requiring that agreements to eliminate application conflicts be filed with the Commission for verification that no dismissing party has received in excess of its legitimate and prudent application expenses, thereby discouraging speculation).

<sup>29</sup> 47 U.S.C. § 309(d)(2). Nor, for similar reasons, would these claims present a question involving lack of candor, *i.e.*, concealment, evasion or other failure to be fully informative. *See Fox River Broad., Inc.*, 93 FCC 2d 127, 129, para. 6 (1983).

<sup>30</sup> *See* Cox Petition at 4; WKNG Petition at 5. WKNG, for example asserts that Cumulus's prediction "does not pass the smell test" in the absence of agreements between the dismissing applicants and Cumulus. WKNG Petition at 5.

<sup>31</sup> The Commission's proposal to dismiss translator applications in spectrum-limited markets occurred within an ongoing rulemaking, shortly after Congress mandated that the Commission ensure LPFM availability based on the needs of the local community. *See* Local Community Radio Act of 2010, Pub. Law. No. 111-371, 124 Stat. 4072 (2011), § 5. Edgewater, the filer of four of the Seven Applications, had voluntarily dismissed translator applications in other markets in advance of the *LPFM Order*. *See, e.g.*, File Nos. BNPFT-20030317FZZ and BNPFT-20030317FYC (dismissing Kansas City applications without letter on June 30, 2011).

action, be considering the *LPFM Order* at a July 12, 2011 open meeting.<sup>32</sup> Cumulus's prediction of the withdrawal of the Seven Applications was in no way extraordinary, and neither petitioner presents *prima facie* evidence of any associated violation.

**Translator Hops.** WKNG and Cox further allege that Edgewater and Cumulus abused Commission processes by accomplishing a major change for the Translator through minor "hops" between 2007 and 2011, contravening a policy designed to maximize opportunities for new LPFM stations. They rely upon holdings in *Mattoon* and *Ashbacker*<sup>33</sup> for the proposition that successive minor "hops" are equivalent to a single major change, and that Cumulus's characterization of the move from Tallapoosa to Atlanta as a series of minor changes violated the rights of others to compete for the spectrum.<sup>34</sup> The Translator's eleven modifications within a four-year period might, under our post-*Mattoon* viewpoint on successive "hops" and if made by a single licensee, raise concerns in a license renewal context. Here, however, Cumulus was involved only in the final two "hops," and the Bureau approved each "hop" before establishing its policy change in *Mattoon*. *Mattoon* established a policy on a going-forward basis and does not provide for the use of that policy retroactively.<sup>35</sup> The policy announced therein is, thus, inapplicable to the present case.

**Interference.** The Rules prohibit FM translators from causing interference to the reception of regular listeners of full-service stations.<sup>36</sup> The Bureau, therefore, required Cumulus to investigate and remediate WKNG's interference complaints, and to suspend Translator operations upon finding that the interference persisted. Cumulus has, consistent with the Rules, investigated WKNG's interference allegations, provided the Bureau with information about its findings, and suspended operations when required. There is no indication that the Translator's operations have been outside of licensed parameters. Although the parties have strongly contested interference-related issues and these matters have taken

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<sup>32</sup> *FCC to Hold Open Commission Meeting Tuesday, July 12, 2011*, Public Notice (Jul. 5, 2011) (FCC to consider "a Notice of Proposed Rule Making seeking comment on the impact of the Local Community Radio Act on the future licensing of low power FM and FM translator stations.").

<sup>33</sup> See WKNG Petition at 7, citing *John F. Garziglia, Esq., W263AQ, Mattoon, IL*, Letter Order, 26 FCC Rcd 12685 (MB 2011) (*Mattoon*), and *Ashbacker v. FCC*, 326 U.S. 327 (1945) (*Ashbacker*); Cox Petition at 6-7, citing *Mattoon*, 26 FCC Rcd at 12687.

<sup>34</sup> In this manner, WKNG and Cox attempt to show that Cumulus's Modification Application should have been treated as a "move-in" to the spectrum-limited Atlanta market, subject to a processing freeze announced in the *LPFM Order*. See WKNG Petition at 6-7; Cox Petition at 6-7. However, because the Modification Application at issue made no change in the Translator's community of license, which was already in Atlanta, the Modification Application could not be considered an Atlanta "move-in" unless we applied the *Mattoon* policy retroactively, which as discussed *infra* is not appropriate. See *LPFM Order*, 26 FCC Rcd at 9998-99. Additionally, we observe that WKNG and Cox's professed concern – a lack of LPFM application opportunities in Atlanta – has not come to pass. The Commission opened an LPFM filing window in 2013 and received applications in the Atlanta area. See *Media Bureau Announces Mutually Exclusive Applications Filed in the LPFM Window*, Public Notice, 28 FCC Rcd 16713 (MB 2013). Stations WATB-LP and WRUX-LP are currently licensed to serve Atlanta.

<sup>35</sup> See, e.g., *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 632 (D.C. Cir. 2000); *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985).

<sup>36</sup> See 47 CFR § 74.1203(a)(3).

significant time to resolve,<sup>37</sup> it appears that the recent remediation has been effective. As discussed above, Cumulus implemented a directional antenna pattern in 2018 which reduced the Translator's ERP toward WWGA. In the time since beginning such operations pursuant to STA, Cumulus has received no interference complaints from WWGA listeners. The facilities which Cumulus seeks to license in the pending 2019 Application reduce ERP even further in the direction of WWGA, compared to the ERP authorized in the 2018 STA.<sup>38</sup> WKNG has not objected to any application specifying the Translator's currently operating facilities. Accordingly, we find that WWGA's interference allegations are not an impediment to grant of the Renewal and 2019 Application.

Nor will we reconsider grants of the 2011 License based on Cox's allegations that the Translator would *receive* interference from WSB-FM once Cox maximizes its digital facilities. If so, Cumulus might need to adjust its operations, but there would be no demonstrated harm to Cox.

**Ordering Clauses.** Accordingly, IT IS ORDERED that the Petition to Dismiss or Deny filed by WKNG, LLC on February 24, 2012 IS DENIED.

IT IS FURTHER ORDERED, that pursuant to Section 309(k) of the Communications Act of 1934, the application to renew the broadcast license of FM Translator station W255CJ, Atlanta, Georgia (File No. BRFT-20111201PCV) IS GRANTED.

IT IS FURTHER ORDERED that the Petition for Reconsideration and Informal Objection filed by Cox Radio, Inc. on September 26, 2011 IS DISMISSED with respect to the Modification Application (File No. BPFT-20110711AEI) and DENIED with respect to the 2011 License (File No. BLFT-20110915ACL). Our grants of those applications ARE AFFIRMED.

IT IS FURTHER ORDERED, that the application of Cumulus Licensing, LLC for a license to cover construction of modified facilities (File No. BLFT-20190208ADP) IS GRANTED.

Sincerely,



Albert Shuldiner  
Chief, Audio Division  
Media Bureau

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<sup>37</sup> Cumulus and WKNG disputed whether the Translator caused interference to WWGA and, if so, whether Cumulus met its obligation to remediate. For example, Cumulus contended that complainants were not *bona fide* regular listeners; that their inability to receive WWGA persisted even when the Translator was turned off; and that the poor reception resulted from factors unrelated to the Translator such as terrain, a weak WWGA signal, and receipt of unwanted signals from other stations. *See, e.g.*, Cumulus, Response to February 8, 2017 WKNG, LLC Letter at 6 and attachments (Feb. 15, 2017). The Bureau's Cessation Letter was based on unresolved interference at one location.

<sup>38</sup> The further reduced pattern appears designed also to protect several LPFM stations. *See* STA Extension, Exhs. 1A-1C.